UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
DANIEL J. WAWRZYNIAK and	)	CASE NO. 98-33099 HCD
CONSTANCE H. WAWRZYNIAK,	)	CHAPTER 13
	)	
DEBTORS.	)	

Appearances:

Steven J. Moerlein, Esq., attorney for debtors, 218 W. Washington Street, Suite 630, South Bend, Indiana 46601; Tedd E. Mishler, Esq., Standing Chapter 13 Trustee, 1912 East U.S. 20, Suite 10, Michigan City, Indiana 46360; Debra L. Miller, Esq., Mediator, P.O. Box 11550, South Bend, Indiana 46634.

MEMORANDUM OF DECISION

At South Bend, Indiana, on July 10, 2003.

On February 27, 2003, the court held a hearing regarding its Order to Show Cause, directing the following persons to appear: debtors Daniel J. Wawrzyniak and Constance H. Wawrzyniak; Standing Chapter 13 Trustee Tedd E. Mishler, Esq.; Mediator Debra L. Miller, Esq.; attorney Steven J. Moerlein, Esq.; attorney Wes Steury, Esq.; and the Manager of American General Finance Company. Those persons were ordered to show cause, if any, why the actions outlined in the court's Order of January 21, 2003, should not be taken. Present at the hearing were the debtors and attorneys Moerlein, Mishler, and Miller. Neither attorney Steury nor the manager of American General Finance appeared at the hearing.

After hearing the positions of the parties, the court made certain findings and took under advisement the issue of Mr. Moerlein's attorney's fees. On March 21, 2003, the Mediator submitted a Summary of Proceedings reviewing all matters raised at the hearing. The parties were given the opportunity to respond to the Mediator's Summary. None responded. The court now issues its findings of fact and conclusions of law.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(O) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The issues before the court, as presented in its Order of January 21, 2003, concerned the management of the debtors' tax refunds, mortgage payments, and compensation to their attorney. The court also directed the parties to show cause why the debtors' chapter 13 bankruptcy case should not be dismissed by the court.

With respect to the issue of the debtors' 2002 tax refunds, the Mediator advised the debtors that the turnover of tax refunds would reduce the arrearages remaining under the mortgage and thus reduce the time necessary to complete their Chapter 13 Plan. The debtors were unsure that they would receive refunds, but hoped to replace a vehicle if there were tax dollars available. This issue was set aside for future consideration by the debtors, the Mediator, and the Trustee if refunds are distributed to the debtors.

The court made certain findings concerning the payments to the two mortgage holders, Standard Federal (now ABN AMRO)[1] and American General Finance. It found that the debtors' Chapter 13 Plan expressly directed that the debtors' payment of $700 (now $720) to Standard Federal, made two days before the bankruptcy

[1] ABN AMRO Mortgage Group, Inc., which is affiliated with Standard Federal Bank, manages the debtors' mortgage account. The Mediator informed the court that, on February 13, 2002, Terry Ginkel of ABN AMRO faxed to the debtors a full history of their loan and notified them that their payments were current.

filing, "be applied to the arrearage." *See* R. 25, Chapter 13 Plan, at 3. Accordingly, the court ordered that ABN AMRO and the Standing Chapter 13 Trustee credit the payment of $720 toward the pre-petition mortgage arrearage owed by the debtors.

The court also found that the debtors' Chapter 13 Plan and the court's Special Order Confirming Chapter 13 Plan, issued March 11, 1999, required the mortgage holder ABN AMRO to be paid both the prepetition arrearage and the interest on the arrearage. The court found at the hearing, therefore, that ABN AMRO's entitlement to interest was res judicata. It further directed that the payments continue as established under the Plan until the debtors' bankruptcy is completed.

Concerning the payment of accrued interest to American General Finance, the Standing Chapter 13 Trustee advised the court that the accrued interest was being paid according to the Plan and would be paid in full by the end of the bankruptcy. The court approved the Trustee's adherence to the terms of the Plan. It also determined that the case should not be dismissed because, according to the calculations of the Mediator and the Standing Chapter 13 Trustee, the debtors' bankruptcy could be completed in less than eighteen months.

The only issue taken under advisement by the court was the question of Mr. Moerlein's attorney's fees. According to the Mediator's Summary, the attorney advised the court that he had received his normal fee of $525 for preparing and filing the debtors' chapter 7 bankruptcy and had received an additional $475 for converting their bankruptcy and filing their Chapter 13 Plan. The debtors claimed that his compensation was unearned and undeserved.

The court's first notification of the debtors' displeasure with their attorney's performance came in a letter the debtors sent to Mr. Moerlein on October 10, 2001, a copy of which was filed with the court on October 12, 2001. They wrote to request an appointment with him, their attorney. They explained that for six months they had called his office, to no avail, to schedule an appointment in order to take care of specific matters of concern. They listed problems with their mortgage arrearage, late payments, and payroll deductions. The

letter stated: "Bankruptcy was filed on 10-26-98 Nothings caught up in fact it's worse than before we filed, when is this to be discharged, was this a 36 month plan." R. 40.

In response to that letter, the court conducted a status hearing on November 29, 2001. The debtors' attorney stated that the employer was not forwarding the wage deductions to the Trustee properly. Following the court's directive, after the hearing Mr. Moerlein took the debtors back to his office to hear their concerns and to set up an appointment for resolution of those issues.

On February 18, 2002, the debtors again wrote a letter, this one directly to the court, "for desperate help on our bankruptcy case." R. 43. They said that Mr. Moerlein had not taken care of any of the problems and had not called them concerning his progress. They noted that, because their plan was a 36-month plan, they should have received a discharge in December 2001. Instead, they stated, "its worse than ever, we have kept our court ordered agreements paying $307.80 every week for the last 38 months and we don't understand why this attorney won't finish a service he started. . . . We paid Mr. Moerlein so far over $700.00 and still paying for no service at all." *Id.* The debtors asserted that, two years before, Mr. Moerlein was aware of the fact that the arrearages were not being paid, in spite of the fact that the plan directed that payments be made toward arrearages. They asked the court: "Should we be responsible for someone not doing there job." *Id.*

The Standing Chapter 13 Trustee responded to the debtors' letter by pointing out Mr. Moerlein's mathematical errors when calculating their Chapter 13 Plan liquidation. *See* R. 45 at 2-4. He presented his own § 1322(d) analysis of the debtors' finances and stated that their plan would not liquidate until 70 months from January 21, 2000. According to the Trustee, "Mr. Moerlein misled the Wawrzyniaks into believing that their plan would take 36 months when in fact it would take 70 months." *Id.* at 6. He noted, as well, that Mr. Moerlein did not return his phone call.

On April 29, 2002, the court held another status conference. Present were the debtors, their lawyer, the Standing Chapter 13 Trustee, and Assistant United States Trustee Alex Edgar. The court again heard from the debtors and the attorneys. It then found that the Trustee's response to the debtors' correspondence accurately

set out the facts. Moreover, no one had filed anything to dispute the Trustee's version of the plan calculations. The court found that Mr. Moerlein had provided poor client service and inaccurate calculations. It noted that this was the second time that the court was required to manage the problems that a proactive attorney would have resolved. It recommended that the attorney begin to improve his service to clients by answering and returning telephone calls. Mr. Moerlein told the court that he was willing to refund the debtors' payments to him in order to terminate his relationship with them as clients. Even though the debtors no longer wanted Mr. Moerlein to represent them, and even though the attorney sought to withdraw from the case, the court ordered Mr. Moerlein to help clean up the problems that he had helped to create. It directed the debtors to cooperate with Mr. Moerlein and to follow the Trustee's recommendations. The court then appointed a mediator, Debra L. Miller, Esq., to facilitate the resolution of the conflicts. *See* R. 46 (Order of May 8, 2002). Following the Mediator's Report to Court on December 12, 2002, the court issued an order summarizing the facts reported by the Mediator. It directed the parties to show cause why this bankruptcy case should not be dismissed and why other actions should not be taken. *See* R. 56 (Order of January 21, 2003).

At the February 27, 2003 show cause hearing, Mr. Moerlein stated that he had accumulated many billable hours in preparing the case on behalf of the debtors and had not been fully compensated for his work. He asserted that he should not be required to disgorge his fees or the $200 in court costs he had paid. He had been paid $900, not $1,000, he said, and reluctantly agreed to return $450 of it if the court required it.

Mrs. Wawrzyniak then presented to the court the debtors' complaints about Mr. Moerlein. She stated that they now were required to make higher payments and must continue to make them for at least another sixteen months before their plan could be completed. They reminded the court of their letters of October 10, 2001 and February 18, 2002, concerning the mortgage arrearages, late payments and payroll deduction difficulties, and of their numerous unreturned telephone calls to Mr. Moerlein.

The Standing Chapter 13 Trustee stated to the court that the Chapter 13 Plan had been underfunded from the start. In his view, Mr. Moerlein should have realized that the plan would require 78 rather than 36

months to complete. He further said that the attorney's actions were deficient and that, at the last hearing, Mr. Moerlein had agreed to surrender all the attorney's fees paid to him, in acknowledgment of his mishandling of the chapter 13 bankruptcy.

The court found that some or all of Mr. Moerlein's fees should be returned to the estate to be distributed to the creditors. It expressly found that it was not satisfied with his representation of the debtors. It took under advisement the question of disgorgement of Mr. Moerlein's compensation.

Discussion

The issue before the court is whether the debtors' attorney should be required to disgorge some or all of the fees paid to him by the debtors. The disgorgement of fees is governed by § 329 of the Bankruptcy Code. It provides:

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, . . . shall file with the court a statement of the compensation paid or agreed to be paid . . . .
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to —
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> (1) the estate if the property transferred —
> (A) would have been property of the estate; or
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

11 U.S.C. § 329. Section 329 gives a bankruptcy court the authority to review the reasonableness of an attorney's fees, to evaluate the fee arrangement and services provided, and to order disgorgement or cancel future payments if the compensation for the services exceeded the reasonable value of the services that were provided. *See In re Geraci*, 138 F.3d 314, 318 (7th Cir.), *cert. denied*, 525 U.S. 821 (1998); *see also In re Toms*, 229 B.R. 646, 660 (Bankr. E.D. Pa. 1999) (citing cases). Bankruptcy Rule 2017, which implements § 329, provides that the court may determine whether any payment made by the debtor to an attorney was excessive.

In determining whether attorney's fees are unreasonable or excessive under § 329, courts are guided by § 330. *See In re Wiredyne, Inc.*, 3 F.3d 1125, 1128 (7th Cir. 1993). Section 330 authorizes a bankruptcy court to award to a debtor's attorney reasonable compensation for actual, necessary services he or she rendered. The reasonableness of the compensation is based on "the nature, the extent, and the value of such services, taking into account all relevant factors, including – the time spent on such services; the rates charged for such services; [and] whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title." 11 U.S.C. § 330(a)(3)(A)-(C). The attorney has the burden of showing that the agreed compensation is reasonable. *See In re Geraci*, 138 F.3d at 318; *see also In re Clark*, 223 F.3d 859, 863 (8th Cir. 2000). It is within the sound discretion of this court to reduces fees under § 329 by weighing the equities of the case in determining whether the fees are unreasonable or excessive.[2] *See In re Clark*, 223 F.3d at 863 (citing *In re McNar Inc.*, 116 B.R. 746, 753-54 (Bankr. S.D. Cal. 1990)). This court "is authorized to act whenever it determines that the compensation the debtor has paid or agreed to pay his counsel exceeds the reasonable value of the services provided." *In re Geraci*, 138 F.3d at 320.

Several appellate decisions from the Seventh Circuit Court of Appeals offer guidance to this court. In *In re Firstmark Corporation*, 132 F.3d 1179 (7th Cir. 1997), the Seventh Circuit approved the careful scrutiny of attorneys' fees and an order for partial disgorgement in a chapter 11 bankruptcy case. In that case, the attorney of a large law firm had stated that his firm had no connection with the debtor corporation. When he discovered that another partner had represented the debtor's former president, he reported the conflict to the chairman of the creditors' committee, but not to the bankruptcy court. The chairman determined that the law firm was not

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[2] Courts have found that justifiable reasons to reduce or require disgorgement of attorney's fees include the existence of a conflict of interest, *see In re Wiredyne*, 3 F.3d at 1128; failure to disclose information requiring disclosure, *see In re Love*, 163 B.R. 164, 171 (Bankr. D. Mont. 1993); advice and preparation of the petition and schedules by a lay person not authorized to practice law, *see Foulston v. Jones (In re Robinson)*, 162 B.R. 319, 326 (Bankr. D. Kan. 1993); counsel's engagement in such improper acts as the failure to file a Rule 2016(b) statement and application for compensation, *see In re Fricker*, 131 B.R. 932, 941 (Bankr. E.D. Pa. 1991); and the lack of documentation to substantiate a fee in excess of the presumptively reasonable fee, *see In re Geraci*, 138 F.3d at 321.

barred from representing the committee. The bankruptcy court approved the firm's fees. However, the district court found that the firm's negligent failure to report the conflict to the court merited a sanction, a disgorgement of some of the law firm's fees. Nevertheless, it decided that the sanction should not be too punitive, since the firm's recovery of a fraudulent conveyance had benefitted the debtor's estate. It therefore ordered disgorgement of $2,250 in fees. The appellate court affirmed the lower courts' handling of the fee issue and stated that the district court's decision to impose the monetary sanction "was far from unreasonable." *Id.* at 1183.

When an attorney in another case breached his fiduciary obligation to the estate, the Seventh Circuit concluded that "[f]ees obtained as a consequence of a breach of fiduciary obligation, even a nonwillful breach . . ., may be retained only if, by analogy to claims for quantum meruit, the fiduciary, notwithstanding his breach, conferred a benefit on his principal." *In re Taxman Clothing Co.*, 49 F.3d 310, 316 (7th Cir. 1995) (concluding that the attorney was required to return to the estate the fees that he received after the breach occurred). In that case, the court found that the lawyer had a duty to maximize the value of the estate and that he knew the preference action he was pursuing was worth less than his fees. Focusing on the maxim that the attorney's compensation was limited to reasonable compensation for actual, necessary services, the court concluded that the attorney "was required as a fiduciary of the estate to make a careful judgment whether the number of billable hours that he would be investing was commensurate with the expected gain. Only one reasonable judgment was possible: that it was not." *Id.* at 314. The court required the attorney to return all fees after the point that he knew that the cost of his defense exceeded the expected benefit. It knew that the result was harsh but opined that "being a creditor and seeing your claim get eaten by a lawyer is a harsh fate as well." *Id.* at 316.

In this case, the evidentiary record of the services performed by Mr. Moerlein on behalf of the Wawrzyniaks has been developed in two lengthy hearings. It is clear to the court that the debtors' chapter 13 case was not complex or unusual; nevertheless, their attorney's inattention and erroneous calculations have resulted in an excessively lengthy bankruptcy. *See In re 437 Park Corp.*, 54 B.R. 326, 327-30 (Bankr. S.D.N.Y. 1985) (requiring lawyer's disgorgement of all payments received from the debtor after noting that "lack of

attention to detail and to the requirements of the Bankruptcy Code and Rules has pervaded this case"). The Standing Chapter 13 Trustee stated that the attorney misled the debtors by establishing a thirty-six month Chapter 13 Plan. According to the Trustee, their lawyer knew or should have known that the plan required much more time. Mr. Moerlein, knowing of the debtors' concerns and the Trustee's comments, had notice from the court that sanctions were being considered and was given two opportunities to be heard. *See In re Clark*, 223 F.3d at 864-65. He did not present evidence to persuade the court that the allegations of the debtors and the Standing Chapter 13 Trustee were erroneous. His only response was that he could not find the errors that the debtors claimed and could not see what went wrong. The court finds that Mr. Moerlein has not demonstrated that his services were necessary to the administration of the debtors' estate, which has continued for years beyond the intended culmination date. *See Grunewaldt v. Mutual Life Ins. Co. (In re Coones Ranch, Inc.)*, 7 F.3d 740, 744 (8th Cir. 1993) (reviewing the disgorged fees of a chapter 11 attorney, concluding that "an attorney who should have known a reorganization was futile before filing the petition has rendered no service to the estate and should therefore not be compensated for such service").

In this case, Mr. Moerlein had the burden of demonstrating that the agreed compensation was reasonable. The court finds that he has failed to establish that he earned his fee by "conferr[ing] a benefit on his principal [the debtors]." *In re Taxman Clothing Co.*, 49 F.3d at 316; *see also In re Pearson*, 108 B.R. 804, 804 (Bankr. S.D. Fla. 1989). In the unrefuted view of the Standing Chapter 13 Trustee, the attorney knew or should have known that the debtors' Chapter 13 Plan could not succeed as a three-year plan. The evidence of record in this case reflects that the attorney's services have not been beneficial in completing this chapter 13 bankruptcy. The court determines that the attorney failed to meet his burden of proving the necessity of his services and the reasonableness of his compensation. The court therefore finds that the attorney's fees paid to Mr. Moerlein were excessive in light of the services he rendered.

At the April 29, 2002, hearing, Mr. Moerlein told the court that he was willing to refund the debtors' payments to him in order to terminate his relationship with them as clients. Although the court directed him to

remain as debtors' counsel and to attempt to correct the problems that had arisen in this case, Mr. Moerlein has presented no evidence of his involvement in the conclusion of this case. The record reflects that the Mediator, not the debtors' attorney, has moved this chapter 13 bankruptcy toward culmination. The court therefore directs that the debtors be refunded the fees they have paid to him. The record indicates that Mr. Moerlein has been paid $1,000. Of that amount, $200 covered court costs. The court orders the disgorgement of $800, amount received by him in fees.

Conclusion

The court made findings of fact and conclusions of law in open court at the hearing conducted on February 27, 2003. Based upon those determinations, the court ordered

> (1) that ABN AMRO and the Standing Chapter 13 Trustee credit the payment of $720 toward the pre-petition mortgage arrearage owed by the debtors;
>
> (2) that ABN AMRO is entitled to interest; and
>
> (3) that the mortgage payments to ABN AMRO and American General Finance, including interest and arrearages, continue as established under the terms of the debtors' Chapter 13 Plan until the debtors' bankruptcy is completed.

The court also determined that the case should not be dismissed at that time.

With respect to the issue of Mr. Moerlein's attorney fees, the court orders disgorgement of his compensation in the amount of $800. The court directs that the disgorged fees be turned over to the Standing Chapter 13 Trustee toward the completion of the debtors' Chapter 13 Plan. The turnover of the $800 is required no later than thirty (30) days from the date of this Order.

SO ORDERED.

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HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT